

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:TL-N-736-01

ZWKing

date: FEB 28 2001

to: Lorna Fenton, Team Manager, LMSB Group 1585
Lee Wurtenberg, Revenue Agent, LMSB Group 1585

from: Zachary W. King, Attorney (LMSB)
June Y. Bass, Associate Area Counsel (LMSB)

subject: [REDACTED]
Restrictive Language in Forms 872
Taxable Year Ending December 31, [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to I.R.S. personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Issue and Short Answer

You asked whether restrictive language that shareholders of a Subchapter S corporation inserted into a Form 872, Consent to Extend the Time to Assess Tax, is acceptable. For the reasons explained below, we believe the language is not acceptable and recommend you prepare new Forms 872 containing the restricted language set out below.

Facts¹

Revenue Agent Lee Wurtenberg is examining the [REDACTED] taxable year Form 1120S of [REDACTED],² a non-TEFRA³ Subchapter S corporation. For the taxable year in issue, [REDACTED] had [REDACTED] shareholders,⁴ all of whom were individuals. You have asked the shareholders to consent to extend the time to assess because the statute of limitations will expire on [REDACTED], (which is less than [REDACTED] days from the date of this memorandum), and the taxpayers want their cases transferred to

¹ Our understanding of the facts is based upon the information you have provided. We have not undertaken any independent inquiry or sought to verify the accuracy of the information you provided. If the actual facts were different from the facts as we understand them, our legal analysis, conclusions and recommendations might be different. Accordingly, if you believe our understanding of the facts is incorrect or inaccurate in any material respect, you should not rely upon this memorandum and should contact our office immediately.

² When this office opened a file for your requested advice, we incorrectly identified the corporation as "[REDACTED]". Agent Wurtenberg subsequently told Attorney Zachary King the corporation's name is [REDACTED]. We also now note that [REDACTED] - not [REDACTED] - is the name written in hand on the sample Form 872 you faxed to us with your request for advice. Accordingly, in this memorandum, and all subsequent communications, we will use the correct corporate name and will update our records and case file to reflect the correct name.

³ For taxable years beginning prior to January 1, 1997, Subchapter S corporations were, unless they were "small S corporations," subject to the so-called TEFRA provisions. See Temp. Treas. Reg. § 301.6241-1T (1987). However, section 1307(c)(3)(C) of the Small Business Job Protection Act of 1996 (Pub. L. No. 104-188) repealed Subchapter D - Tax Treatment of Subchapter S Items - for corporate taxable years beginning after December 31, 1996. Because the taxable year in issue began after December 31, 1996, we agree that [REDACTED] is not a "TEFRA" entity for this taxable year.

⁴ For purposes of determining the number of shareholders of a Subchapter S corporation, a husband and wife are treated as one shareholder. I.R.C. § 1361(c)(1). We understand each of the [REDACTED] "shareholders" during the year in issue was a husband and wife. We refer to each such couple as one shareholder.

Appeals.⁵

Each of the [REDACTED] shareholders reported their [REDACTED] taxable year distributive share of income, loss, credit, etc. of [REDACTED] on Forms 1040. Each shareholder timely filed their [REDACTED] Forms 1040 on or before [REDACTED] (after filing requests for automatic extensions to file).

Each of the [REDACTED] shareholders has given Agent Wurtenberg a signed Form 872, Consent to Extend the Time to Assess Tax, extending the period to assess income tax due for the period ending [REDACTED], until [REDACTED]. The Service has not counter-signed these Forms 872. The [REDACTED] shareholders were provided a copy of Service Publication 1035, Extending the Tax Assessment Period. Acting upon Publication 1035's explanation of their rights to restrict the consent to extend the assessment period, all [REDACTED] shareholders have chosen to restrict their consents. Each shareholder has inserted the following underlined language (or substantially similar language)⁶ in the Forms 872 Agent Wurtenberg prepared:

[taxpayers' names] taxpayer(s) of [taxpayers' address] and the Commissioner of Internal Revenue consent and agree to the following: (1) The amount of any Federal Income tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended [REDACTED] with respect to possible changes resulting from our ownership interest in [REDACTED] may be assessed at any time on or before [REDACTED].

Discussion

Internal Revenue Manual ("IRM") section 4541.71 sets forth the procedures for using restricted consents. IRM 4541.71(5) indicates use of a restricted consent is appropriate where flow-through issues are involved and are the only issues subject to the examination.

We understand Agent Wurtenberg's case is just such a situation; the only examination issues are the flow-through items from [REDACTED]. Thus, it is appropriate to use restricted consents in this instance.

⁵ Under these circumstances, it is appropriate to request a consent. IRM 4541.1(1)(c).

⁶ We subsequently refer to the above-quoted underlined text as the "shareholder's restricted consent language."

IRM section 4541.72 proscribes the procedure to which Service personnel should adhere in preparing restricted consents. In pertinent part, 4541.72(1) reads as follows:

[e]ach restricted consent must contain a basic restrictive statement and a description of the area(s) of consideration. While the area(s) of consideration will vary with each restricted consent, the basic restrictive statement will remain constant. . . . The basic restrictive statement is as follows: "The amount of any deficiency assessment is to be limited to that resulting from any adjustment to (description of the area(s) of consideration) including any consequential changes to other items based on such adjustment."

In this instance, the shareholders' restricted consent language does not contain the required basic restrictive statement and thus should not be used. See IRM 4541.71(10) (language contained in IRM 4541.72(4)(d), (e) or (f) should be used in non-TEFRA situations where only flow-through issues involved). Specifically, the shareholders' restricted consent language is not acceptable because it is less precise than the IRM required language, particularly with respect to what the IRM refers to as "consequential changes." See IRM 4541.72(3). While the taxpayer's phrase, "with respect to possible changes resulting from our ownership interest in [REDACTED]," is arguably broad enough to permit assessment of tax attributable to adjustments of Form 1040 items affected by the adjusted flow-through items, such as Schedule A medical expense deductions and other items tied to adjusted gross income, it is not entirely clear the shareholders' language permits such assessments. With the IRM's above-quoted "basic restrictive statement," however, there is no such doubt.

Recommendation

Thus, we recommend you not counter-sign these Forms 872. We recommend that Agent Wurtenberg prepare new Forms 872 with the following language replacing the shareholders' restricted consent language:

The amount of any deficiency, penalty, addition to tax and/or interest assessment is to be limited to that resulting from any adjustments to: (a) the taxpayer's distributive share of any item(s) of income, gain, loss, deduction, or credit of, or distribution from, [REDACTED]; (b) the tax basis of the taxpayer's interest in [REDACTED]; and (c) any gain or loss (or the character or timing thereof) realized upon the sale or exchange, abandonment, or other disposition of taxpayer's interest in [REDACTED]; including any consequential changes to

other items based on such adjustments.

As used herein, the term "adjustment" means any change or changes to said item(s) whether reported or not reported on the return. The change can be in amount, taxable status, allocation, character, etc.

As used herein, the term "consequential changes" means any direct or indirect effect.

In order to limit the application of I.R.C. § 6511(c), you should also add a footnote reading as follows: "The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustments for which the period for assessment is extended under this agreement." IRM 8233.(12)(4).

Closing

This opinion is being forwarded to the Office of Chief Counsel for post-review; we will advise you as soon as possible if any changes to the advice are recommended. If you have any questions about this memorandum, please call Attorney Zachary King at (949) 360-3463.